DOCKET FILE COPY ORIGINAL ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

JUL 13 2004

Federal Communications Commission
Office of Secretary

In the Matter of	)	
A La Carte and Themed Tier	)	MB Docket No. 04-207
Programming and Pricing Options for	)	
Programming Distribution on Cable	)	
Television and Direct Broadcast Satellite	)	
Systems	)	

JOINT COMMENTS OF SMALLER OPERATORS

Fleischman and Walsh, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20006
(202) 939-7900

July 13, 2004

No. of Copies rec'd 0+3

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

JUL 1 3 2004

Federal Communications Commission
Office of Secretary

In the Matter of	)	
A La Carte and Themed Tier	)	MB Docket No. 04-207
Programming and Pricing Options for	)	
Programming Distribution on Cable	)	
Television and Direct Broadcast Satellite	)	
Systems	)	

JOINT COMMENTS OF SMALLER OPERATORS

Bend Cable Communications, LLC, Bresnan Communications, LLC, Eagle Communications, First Commonwealth Cablevision, Ltd., Midcontinent Communications, Millennium Digital Media Systems, LLC, Sjoberg's, Inc. and Susquehanna Communications (collectively "Smaller Operators"), by their attorneys, hereby file these joint comments in response to the Commission's Public Notice in the above-captioned matter.[1] As discussed below, the Smaller Operators are broadly representative of a segment of the cable television industry that would face particularly significant financial, logistical, and technological burdens if forced by government fiat to implement a la carte or themed tier service offerings. Because such regulatory interference in the marketplace stands to harm the Smaller Operators and their customers by increasing the price of cable service while simultaneously reducing program diversity and quality, these operators strongly oppose any government intrusion into the editorial

[1] *See* Public Notice, *Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, DA 04-1454, 19 FCC Rcd 9291 (May 25, 2004).

and business decisions that they make regarding the packaging and pricing of cable programming.

SUMMARY

The Smaller Operators represent a segment of the cable industry that is particularly vulnerable to the adverse consequences that will inevitably follow if the government attempts to force the implementation of a la carte or themed tier service offerings. Historically, companies such as the Smaller Operators have had higher per subscriber costs, owing to the absence of certain economies of scale, the added expense of constructing facilities to serve lower density areas, and the smaller number of customers over which to spread their costs. Nevertheless, this segment of the industry, relying on private investment capital, has kept pace with larger companies by upgrading their systems and expanding their service offerings.

Increasingly, however, smaller cable operators find themselves being squeezed in a fiercely competitive marketplace, and particularly by higher programming costs. Some suggest that government-mandated regulations aimed at giving customers the ability to select programming on an a la carte or themed tier basis will reduce cable bills and foster a more competitive marketplace. In the view of the Smaller Operators, such regulatory proposals – which ignore the economic realities of the industry – represent a "cure" that is far worse than the disease.

In particular, the implementation of a forced regime of a la carte or themed tier service offerings will drive up the price of programming and drive down programming quality and diversity. Limiting the programmers' reach will reduce their ability to offset a portion of their costs with advertising. They will also have to spend more to persuade customers to buy their service. This will cause programmers either to raise the licensing fees they charge cable operators or reduce their investment in quality programming. In many instances, they will do both. Higher prices and lower quality will, in turn, drive down customer interest in these services, to the point that the range of programming choices that cable operators now make available will decrease.

Thus, the benefits of a la carte and themed tier service offerings will be illusory – customers will end up being asked to pay more for less. Smaller cable operators, already faced with the difficult task of controlling escalating prices, would be particularly harmed by this development. They also would be harmed by a variety of other costs that would have to be incurred in order to implement a la carte or themed tier service offerings. For example, there are substantial equipment and technical costs associated with the implementation of a la carte and themed tier service offerings. Managing the customer interface (both in terms of ordering and billing issues, as well as operational questions) under an a la carte or themed tier regime also will entail significant new expenses and generate customer confusion and dissatisfaction.

The disproportionate burden that smaller cable operators will face is compounded by the fact that the DBS industry, which is the Smaller Operators' principal competition, already is fully digital and thus would not face the same costs in implementing an a la carte or themed tier mandate. Given the competitive environment in which smaller cable operators do business, anything that exacerbates the disparities between large, nationally-marketed DBS operators and smaller locally-oriented cable operators ultimately may adversely impact the ability of smaller operators to attract investment. It is for these reasons that the Smaller Operators strongly oppose suggestions that mandating a la carte or themed tiers will have a positive impact on competition.

Similarly, Smaller Operators dispute the need for dictating a la carte and themed tier offerings as a way to give customers greater control over the content that is available in their homes. The Smaller Operators, which truly are "neighbors" with their subscribers, are sensitive to their customers' concerns in this regard, and have taken steps both to educate their customers regarding the availability of less intrusive tools for controlling content and to provide additional such tools. That approach (which has the added benefit of being consonant with the First Amendment), not intrusive government regulation of program packaging, best serves the public interest.

BACKGROUND

While the Smaller Operators share the common characteristic of having fewer systems and/or subscribers than the major multiple system operators, they cover the waterfront with respect to the characteristics of the systems that they operate and the communities that they serve. Thus, the experiences and concerns of the Smaller Operators are broadly representative of the experiences and concerns of dozens of other smaller operators across the country.[2]

For example, included among the Smaller Operators are early pioneers in the industry as well as more recent entrants into the field. These companies' systems typically serve subscribers numbering in the hundreds or single digit thousands, although some operate systems as small as 11 subscribers and as large as 90,000 subscribers. The types of areas served include less densely populated rural areas and farming communities, as well as a range of suburban and urban areas. In terms of channel capacity and services offered, the Smaller Operators' systems offer anywhere from approximately 20 to 80 analog channels, and many have launched, or are in the process of rolling out, digital video, high-speed Internet, and voice services. The analog video services offered by the Smaller Operators are packaged in a variety of ways, including large basic tiers, lifeline basic plus expanded tiers, and a la carte premium services. The digital service offerings

[2] Individual profiles of each of the Smaller Operators are provided in Exhibit A.

of these operators are similarly diverse and include, in a few cases, themed digital mini-tiers, such as a family package or sports package.

DISCUSSION

I. A FORCED REGIME OF A LA CARTE OR THEMED TIER SERVICE OFFERINGS WOULD IMPOSE SUBSTANIAL LOGISTICAL, FINANCIAL, AND TECHNOLOGICAL BURDENS ON SMALL CABLE OPERATORS.

As a general matter, the costs associated with implementing an a la carte or themed tier requirement would present overwhelming logistical and financial obstacles for smaller cable operators. While some of these problems also will confront larger cable operators, the fact is that smaller operators frequently operate smaller systems in less densely populated areas that require construction and maintenance of more widespread and expensive facilities on a per-customer basis. Moreover, as a rule, smaller operators commonly have more limited (and more costly) options when it comes to obtaining capital to support investment in their operations and are at a greater disadvantage than larger operators when it comes to competing against the cable industry's primary competitors, DirecTV and EchoStar. Consequently, shifting to an a la carte or themed tier regime simply is not currently a feasible option for the typical smaller operator.

A. Equipment and Technical Burdens.

Although it is rarely noted, the fact is that, in terms of equipment and technology, the costs of delivering individually-selected channels of programming to a customer are greater than the costs of delivering a bundle of services. This is, in large part, because not all programming presently is scrambled, and cable operators generally must use trapping or hybrid analog-digital boxes to ensure that customers get only the services for which they pay.[3]

---

[3] *See* National Cable & Telecommunications Association, *The Pitfalls of A La Carte: Fewer Choices, Less Diversity, Higher Prices* (May 2004), at 13-14 ("*NCTA A La Carte Report*"), available at

Under an a la carte model, trapping would not work. Typically, a separate trap would be needed for each channel to be blocked, and too many traps cause signal degradation.[4] Moreover, trapping cannot be done from the headend but rather requires a visit by a technician to the customer's premise. As a result, implementation of changes in a subscriber's selection of a la carte programming would require technicians to make repeated truck rolls to the customer location.[5]

Hybrid analog-digital boxes similarly would not work as a means of implementing a la carte or themed tier service offerings because cable operators would need to scramble all networks in order to implement such programming options.[6] Insofar as the hybrid boxes being deployed today do not have the capability to descramble analog scrambled programming, cable operators would need to deliver the channels in digital format, all customers would need to purchase or lease a separate addressable digital set-top box for every television set connected to the cable system, and the operator would need to ensure that the set-top box unscrambles only those channels that the customer has purchased.[7] This would have to occur at a time when only approximately 30 percent of cable customers subscribe to digital tiers and services,[8] and many, if

---

programming to which they do not subscribe. Today's hybrid analog-digital boxes unscramble digital scrambled programming but analog programming is sent "in the clear."

[4] *See id.* at 14.

[5] *See id.*

[6] *See* U.S. General Accounting Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, GAO-04-8 (Washington, D.C.: October 2003), at 32 ("*GAO 2003 Cable Rates Report*").

[7] *See id.* (Because of the "need to scramble all of the networks they transmit to ensure that subscribers are unable to view networks they are not paying to receive[,] . . . addressable converter boxes, which enable the operator to send messages from the cable facility to the box to indicate which networks the subscriber is purchasing and thus allowed to watch, would need to be connected to all television sets attached to the cable system.").

[8] *See* National Cable & Telecommunications Association, *2004 Mid-Year Industry Overview*, at 7, available at http://www.ncta.com/pdf_files/Overview.pdf.

not most, digital service customers do not have a digital set-top box for every television set they own.

As a result, the technical "solution" of digitizing all channels would come at tremendous expense to cable operators and their customers. Indeed, for operators such as the Smaller Operators, the impact on costs would be particularly daunting, given the smaller base of customers over which this expense can be spread. For example, at the system level, cable operators would now need to digitize the analog channels that had been previously trapped or carried "in the clear." This would entail a significant expense – thousands of dollars per channel. Moreover, this cost does not include any additional equipment needed for distributing the signals over the cable system, as well as the additional space, electric power and heating and air conditioning that might be needed to accommodate this equipment.[9]

All of these costs invariably would have to be passed on to the customer – although in the current competitive environment there is a limit to how much additional expense consumers will bear. In addition, many cable subscribers today do not need a set-top box (and many customers resist taking services that require a box). One smaller operator estimates that 80 percent of its more than 200,000 customers do not presently have a set-top box. Assuming an approximate average cost of $4.50 to $8.00 to rent a box,[10] a customer with three television sets (a typical situation) would now face an additional $13.50 to $24.00 monthly expense. Many of these customers will incur an additional fee for having the cable operator install the box(es). For just the Smaller Operators (and their customers), the total economic cost of implementing a la carte would be in the hundreds of millions of dollars.

---

[9] *See NCTA A La Carte Report* at note 27.

[10] Even with the new "plug and play" digital consumer equipment, customers would still need a CableCARD.

B. Ordering Systems and Billing Problems.

In order to implement a la carte and/or themed tiers, most, if not all, cable operators also would need to make substantial changes, at considerable expense, in their ordering and billing systems. Even if a cable operator allowed subscribers to select a set number of channels from a menu of options at a flat rate – a highly unlikely scenario considering the programming cost differences among various channels – the operator still would need to adapt its billing mechanisms to track each customer's particular selections so as to be able to report subscriber totals to the programmers on a per channel basis. One smaller cable operator, which serves fewer than 9,000 total customers, estimates that the billing software changes needed to accommodate a la carte would cost approximately $1,200 more per month.

Beyond the direct costs associated with revamping billing system software, there are administrative costs to consider. Under an a la carte pricing arrangement, it is entirely plausible that some number of customers will attempt to engage in the practice of repeatedly ordering and canceling channels in order to get a particular program at the lowest possible price.[11] It also is a virtual certainty that operators will have to deal with an increased number of disputes about whether or not a customer actually ordered a particular channel.

C. Customer Service Hurdles.

Extensive a la carte service offerings likely would create a customer service nightmare, starting with the difficulties customers would encounter simply in setting up a la carte service. For example, whether they pay for installation of newly-required digital set-top boxes or seek to install boxes themselves, a significant portion of customers that previously did not need a set-top

[11] Cable operators already deal with these issues on a smaller scale: some customers today order HBO for Sunday to watch *The Sopranos* and then cancel it again on Monday. Taken to an extreme, a la carte could easily become a la carte on a program-by-program basis, more akin to all-day video-on-demand.

box will be confused and frustrated, particularly with respect to the customer wiring issues that frequently arise with the myriad of home electronics equipment used in combination with cable. The experience of the Smaller Operators in introducing new services suggests that customer service representatives ("CSRs") will be required to spend substantially more time explaining to customers their options and associated costs.[12] CSRs also will be required to spend a significant amount of additional time with customers who want to make changes to their channel line-ups or who are raising billing issues such as those described in the preceding section. Smaller Operators will face the prospect of having to greatly increase the size of their customer service departments. To the extent that marketplace conditions allow, these costs ultimately will add to the price paid by customers. And for some Smaller Operators, these costs simply may be unaffordable.[13]

D. Capital Acquisition Issues.

It is important to remember that like the rest of the cable industry, smaller cable operators have built their systems using private capital with no guaranteed return. Unlike other media and communications services, the government has not subsidized cable's growth. In fact, in addition to offering service to customers, cable operators traditionally make significant payments to the communities they serve in the form of franchise fees, free service to government and schools, free or discounted institutional networks, and PEG capacity and support.

[12] Imagine a CSR-customer conversation. CSR: "Do you want *Lifetime*?" Customer: "I don't know, what is on it – is that the channel with *Ellen* on it?" OR "What's the difference between *Lifetime* and *Oxygen*?" Customer: Can I take *Cartoon Network* but not the "Adult Swim" portion from 11 p.m. to 5 a.m. because I don't think it is appropriate for my kids?

[13] *See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, ¶ 17 (1995) ("*Rate Regulation Sixth Report and Order*") ("[S]maller operators have too few subscribers to generate the revenues sufficient to cover the expense of hiring enough employees to comply with existing rules. . . .").

Cable's capital markets generally appear to be comfortable with the present model of program packaging, marketing and pricing. However, the segment of the industry represented by the Smaller Operators historically has had a more difficult time attracting private capital than larger companies and if this model were to now suddenly change, it is these smaller entities that will face the greatest risk that lending institutions will become nervous and tighten access to capital. Once again, in the end, it will be the customer that will have to pay the price of any such capital crunch through increased rates and the loss of new services.

E. The DBS Industry's Competitive Advantage.

Finally, the Commission needs to keep in mind that smaller cable operators face a formidable competitor in DBS. As of the FCC's *Tenth Annual Video Competition Report*, DBS now claims approximately 20 percent of all MVPD subscribers.[14] The two largest DBS providers – DirecTV and EchoStar – had approximately 11.6 million and 8.8 million subscribers respectively as of June 2003.[15] Their size affords them enormous leverage in competing with companies such as the Smaller Operators. For example, the DBS providers, which are comparable in size to some of the largest MSOs, enjoy economies of scale in their purchases of programming and equipment that smaller operators typically cannot match. DBS operators also have a nationwide footprint that permits them to engage in highly efficient national advertising campaigns and to enter into nationwide marketing arrangements with retailers such as Radio Shack. And because DBS customers already have digital set-top boxes, DBS providers would be able to implement a forced regime of a la carte or themed tier service offerings without incurring many of the burdens outlined above. Consequently, even if the DBS industry shifted to a la carte

[14] *See In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, ¶ 65 (2004) (*"Tenth Annual Video Competition Report")*.

[15] *See id.* at ¶ 67.

or themed tier pricing, smaller cable operators would not necessarily be able to follow suit given the differences between the ability of a smaller operator and a multi-million subscriber DBS provider to handle the associated burdens.

II. GOVERNMENT INTRUSION INTO CABLE OPERATORS' PROGRAM PACKAGING DECISIONS IS UNWARRANTED.

The preceding section of these comments focused on the hurdles that cable operators, particularly smaller cable operators, presently would face in complying with a requirement that they offer a la carte and themed tier service offerings. In this section, the Smaller Operators will address the various justifications (such as remedying marketplace failure, reducing consumer prices, and promoting parental choice) that have been offered by those who would have the government intrude into the way cable operators package and price their services. As will be shown, while it is conceivable that future marketplace driven changes in technology and business conditions may reduce the obstacles to a la carte and themed tier service offerings, there is no need for the government to attempt to force such changes through regulatory intervention and, in fact, any such attempt will harm, rather than benefit, the public interest.

A. The Competitive Marketplace, Not Government Regulation, Should Direct a Cable Operator's Packaging and Pricing of Services.

Some argue that government regulation of the way that cable operators package and price their services is necessary because, without such intervention in the marketplace, cable operators will never make services available on an a la carte or themed tier basis. However, throughout the industry's history, cable operators – including smaller cable operators – have experimented with a variety of packaging and pricing options, including single tier systems, multiple tier systems, multiplexing, and a la carte and pay-per-view. The staying power of one approach versus another has reflected the operation of marketplace forces and should continue to do so. Indeed, as noted above, several of the Smaller Operators currently are experimenting with digital "mini-tiers" where justified by market conditions.

Moreover, even proposals that purport to eschew government mandates and instead claim simply to be aimed at promoting "voluntary" a la carte or themed tier service offerings represent a dangerous intrusion into the marketplace. Regulation of wholesale packaging and pricing arrangements could lead to regulation of a cable operator's retail operations – and to a host of unintended consequences such as higher administrative costs, reduced investment, and diminished consumer choice.

Smaller cable operators in particular tend to bear the costs of complying with government regulation more heavily than their larger counterparts. This is because smaller cable operators typically have fewer customers over which to spread expenses. Thus, while the rate regulation regime established by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") negatively impacted all cable operators, it created particular hardships for smaller cable operators in terms of the cost of hiring enough employees to comply with the rules or of obtaining legal and accounting assistance.[16] It was in substantial part because of these disproportionate administrative burdens that the Commission and Congress eventually carved out specific provisions affording smaller operators a measure of relief from the 1992 Act. As with rate regulation, the pure regulatory costs associated with complying with government regulation of a cable operator's packaging decisions would disproportionately burden smaller cable operators.

The goal of maximizing consumer welfare will best be served if cable operators are left free to make their editorial and business decisions regarding the packaging of services without

[16] *See Rate Regulation Sixth Report and Order,* at ¶ 17.

costly and unnecessary government intervention into those decisions. As noted above, cable operators nationwide face competition from at least two large and well-financed DBS operators that have proven to be particularly strong competitors in the rural areas often served by smaller cable operators. With the deployment of local-into-local service, these DBS operators are now well-established in suburban and urban communities as well. Furthermore, a growing number of operators face additional competition from new wireline multichannel video programming distributors ("MVPDs").[17] And more competition is on the horizon, with the launch of a new DBS provider (Cablevision's VOOM service) and US Digital Television, Inc., a wireless television service that leases digital spectrum from broadcasters.[18]

The development of this highly competitive video marketplace obviates the need for government intrusion into program packaging and pricing.[19] For example, SBC Communications recently announced its intention to enter the MVPD services arena with a fiber-based, IP-driven network that would allow for "customizable channel lineups."[20] Whether this approach succeeds – and whether it drives the development of new packaging and pricing

---

[17] *See, e.g., Tenth Annual Video Competition Report*, at ¶¶ 78-81.

[18] *See* Linda Moss, *Upstart USDTV Adds Programmers, Cash*, MULTICHANNEL NEWS ONLINE, March 22, 2004, available at http://www.multichannel.com/index.asp?layout=articlePrint&articleID=CA404879.

[19] Recent government surveys have found generally that the presence of competition results in lower cable rates and better quality service. *See* U.S. Government Accounting Office, *Telecommunications: Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T (Washington, D.C.: March 25, 2004) (Testimony of Mark L. Goldstein, Director, Physical Infrastructure Issues, before the Committee on Commerce, Science, and Transportation, U.S. Senate) ("*GAO 2004 Cable Rates Testimony*").

[20] See Press Release, *SBC Communications Announces Advances in Initiative to Develop IP-Based Residential Network for Integrated Video, Internet VoIP Services* (June 22, 2004), available at http://www.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=21207; *see also SBC to Take on Cable With $6B Upgrade*, MULTICHANNEL NEWS ONLINE, June 23, 2004, available at http://www.multichannel.com/article/CA429226?display=Search+Results&text=sbc.

models – should be left to the marketplace without the needless cost and distorting impact of government regulation.

B. Offering Services on an A La Carte or Themed Tier Service Basis Will Increase, Not Decrease, the Price of Cable Service and Will Decrease Diversity and Choice in Programming.

Another rationale proffered in support of the government regulating the packaging and pricing of cable programming is that it will make cable a better value for customers by allowing them to pay only for specific services that they select. However, as the GAO has recognized, "[a] move to an a la carte approach could result in reduced advertising revenues and might result in higher per-channel rates and less diversity in programming choice."[21] These adverse consequences are particularly likely to affect smaller cable operators and their customers.

1. A La Carte Will Result in Increased Programming Costs for Smaller Operators and Their Customers.

Simple economics dictates that a la carte will lead to increased programming costs and, in turn, to increased consumer prices. Cable programmers primarily rely on license fees and advertising as their sources of revenue.[22] The greater the audience reach, the more advertisers are willing to pay.[23] To maximize advertising revenue, most programmers therefore seek carriage on the most widely distributed tiers.[24] A la carte, or even required "themed tier" service offerings would turn this model on its head. Without widespread distribution, cable networks will generate less advertising revenue and rely more heavily on licensing fees imposed on cable

---

[21] *See GAO 2004 Cable Rates Testimony*, at 3.

[22] *See GAO 2003 Cable Rates Report,* at 34 (concluding that, based on available data, certain cable networks "received nearly half of their revenue from advertising in 2002").

[23] *See id.* at 35.

[24] *See id.*

operators.[25] They will also have to spend substantially more on promoting, branding and marketing their services in order to convince customers to purchase them. This will raise both the cost of programming for the cable operator and its customers.

This problem was described in a recent letter to Senator George Allen from a group of independent cable program networks:

> [c]able program services like ours generally depend on a dual revenue stream of advertising and license fees paid by cable operators and satellite carriers. A substantial portion of our networks' revenue comes from advertising, which is directly tied to audience reach. This economic model has been tremendously successful in improving the quality and quantity of television programming choices for the American consumer. Mandating a la carte or specialized tier distribution of cable networks would undermine the dual revenue stream model.[26]

Further compounding the adverse impact that a la carte and themed tiers will have on cable operators and their customers is the fact that many cable operators – including an increasing number of smaller operators – seek to offset increasing programming costs through local advertising sales.[27] Absent broad distribution, the revenue generated by local ad sales is certain to diminish.[28] All said and told, the great majority of customers would not gain any savings and, in fact, would likely fare worse under an a la carte or themed tier packaging regime.

---

[25] *See id.*

[26] *See* Exhibit B, Letter dated March 8, 2004, to Honorable George Allen, Committee on Commerce, Science and Transportation, United States Senate. *See also GAO 2004 Cable Rate Testimony*, at 15-16.

[27] *See GAO 2004 Cable Rate Testimony,* at 10 ("Although programming is a major expense for cable operators, several cable network executives we interviewed also pointed out that cable operators offset some of the cost of programming through advertising revenues.").

[28] Although the situation is changing over time, smaller cable operators have tended to lag behind their larger brethren with respect to their ability to offer local advertising to increase revenue. *See Rate Regulation Sixth Report and Order*, at ¶ 17. To the extent that some operators have had to traditionally absorb certain costs that might otherwise be offset by advertising revenue, and those costs stand to dramatically increase with a la carte, customers would still see increases in their rates.

2. A La Carte Would Result In Diminished Program Diversity.

Requiring operators to shift to a la carte and themed tier packages also would adversely impact cable operators and their customers by causing a significant diminution in the current level of program diversity and quality that is available over cable television. In order to gain a foothold, new services often need the exposure they get from being packaged with other, established services. Consequently, as a group of female programming executives have explained, proposals to alter the way in which programming is packaged and priced

> would hurt our businesses, which our viewers value and believe have enriched the television landscape. . . . A substantial portion of our networks' revenues comes from advertising, which is directly tied to audience reach. . . . *A la carte* distribution of cable networks . . . would substantially reduce audience reach and viewership, resulting in significant reductions in advertising revenue that would cause the demise of many existing cable program services and severely limit the creation of new ones.[29]

Similar concerns have been expressed by other programmers, including several minority network executives, who noted that "a la carte packaging and pricing of programming would have a chilling effect on programming diversity in America."[30] Of course, the real concern here is not just the impact that a la carte would have on program diversity. Rather it is the impact that it will have on customers who may not only pay more for service, but also will receive less value for their money.

C. Cable Operators Can and Do Offer Customers a Range of Tools to Control the Programs That Come Into Their Homes.

For some, the reason that the government should mandate a la carte or content-specific themed tiers has less to do with pricing and more to do with the control that such intervention

---

[29] *See* Exhibit C, Open Letter dated May 5, 2004, to Members of Congress, from Concerned Women Programming Executives Opposing *A La Carte* Pricing of Consumers' Television Channel Choices.

[30] *See* Exhibit D, Letter dated May 12, 2004, to Honorable Joe Barton and John Dingell, Energy and Commerce Committee, U.S. House of Representatives.

would give customers over the programming that is available in their homes. However, leaving aside the obvious First Amendment issues raised by the imposition of content-based mandates on a cable operator's exercise of its editorial discretion in selecting and packaging its program offerings, such government intrusion is not necessary to achieve the desired end.

Cable operators are strongly sympathetic to the concerns expressed by some of their customers about certain content available on television today and have been at the forefront of efforts to educate their customers regarding the availability of tools that can increase their control over programming. For example, earlier this year, NCTA announced an initiative that encourages cable operators to make available parental control devices to customers at no cost.[31]

Moreover, the Smaller Operators, which often truly are "neighbors" with their customers, are particularly sensitive to this issue and have embraced the use of measures such as rating systems for both broadcast and cable network programming, the V-Chip, parental control features on cable set-top boxes, and scrambling of programming to which customers do not subscribe to overcome "signal bleed." The issue of parental control is best addressed through these efforts, not through heavy-handed government regulation that likely will raise costs and diminish choice for all customers.[32]

---

[31] *See* Letter dated March 2, 2004, to Honorable Michael Powell, Chairman, Federal Communications Commission, from Robert Sachs, President and Chief Executive Officer, National Cable & Telecommunications Association, available at http://www.ncta.com/Pdf Files/Sachs Letter to Powell march 24.pdf; *see also* Issues Brief, *Cable Puts You in Control* (April 2004), available at http://www.ncta.com/pdf files/IssueBriefs/CPYiC.pdf.

[32] Government regulation of program packaging as a means of content control is a slippery slope that will not be easily contained. If the government mandates that cable networks be offered on an a la carte basis in order to "protect" consumers from channels that they prefer not to have available in their homes, the inevitable next step will be demands that the government mandate that all content be offered on a pay-per-view basis so as to allow consumers to control not only the channels, but the particular programs, that enter their homes.

CONCLUSION

Notwithstanding the facial appeal that a la carte or themed tier service offerings may offer, the inevitable result of government mandates regarding the way in which cable operators package programming is that customers will wind up as the decisive losers, paying more for less. Moreover, smaller cable operators, which already face difficulties in controlling escalating costs in a fiercely competitive marketplace, will be particularly vulnerable to the adverse consequences of a forced a la carte and themed tier regime. Therefore, the Smaller Operators urge the Commission not to take any action, including making recommendations to Congress, that would result in government intrusion into the packaging and marketing of cable programming by cable operators.

Respectfully submitted,

SMALLER OPERATORS

Bend Cable Communications, LLC,
Bresnan Communications, LLC
Eagle Communications,
First Commonwealth Cablevision, Ltd.,
Midcontinent Communications,
Millennium Digital Media Systems, LLC,
Sjoberg's, Inc., and
Susquehanna Communications

By: ______________________

Seth A. Davidson
Lisa Chandler Cordell
Fleischman and Walsh, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20006
(202) 939-7900

July 13, 2004

EXHIBIT A

Bend Cable Communications (dba Bend Broadband)

Bend Broadband ("Bend") is an independent, privately owned cable company, which operates a 750 MHz hybrid fiber coaxial system that serves approximately 29,000 customers in central Oregon. The system presently offers customers analog and digital cable services, including high-definition television ("HDTV"), and as well as cable modem service. Bend anticipates introducing video-on-demand ("VOD") and digital video recorder ("DVR") technology later this year, and Voice Over Internet Protocol ("VoIP") services in 2005.

Bresnan Communications, LLC

Bresnan Communications, LLC ("Bresnan") reentered the cable business in March 2003. It serves approximately 310,000 basic customers in primarily rural communities in Colorado, Montana, Utah and Wyoming. Digital and cable modem services are available to more than 90 percent of homes passed, with HDTV, VOD and DVR services launched in 2004. Bresnan plans to initiate a VoIP telephony trial in 2004 as well.

Eagle Communications

Eagle Communications ("Eagle") is an employee-owned company serving approximately 12,000 cable customers in central and western Kansas. In addition to its analog services, Eagle offers nearly all of its customers digital and broadband services (*e.g.*, HDTV, broadband Internet services, Internet business services and wireless Internet).

First Commonwealth Cablevision, Ltd.

An independently owned company, First Commonwealth Cablevision, Ltd. ("First Commonwealth") has a 5,000 subscriber system in rural southeast Virginia. It offers analog cable service to all customers, and is in the middle of an upgrade of its system to at least 550 MHz two-way plant, with plans to complete the system upgrade in 2005. Digital cable and cable modem service was recently launched in those areas passed by the upgraded plant, and the company is considering launching HDTV.

Midcontinent Communications

Midcontinent Communications ("Midcontinent"), a partnership of Midcontinent Media and Comcast Communications, operates more than 200 mainly rural systems that serve approximately 225,000 cable customers in North and South Dakota, western Minnesota and northern Nebraska. Approximately 70 percent of its customers are served by systems which offer analog and digital cable services, cable modem service, HDTV and switched telephony. Midcontinent has plans to upgrade many more of its systems by the end of 2006. During 2004, Midcontinent anticipates launching DVR services in many of its systems and to begin beta testing of VoIP telephony.

Millennium Digital Media Systems, LLC

Founded in 1997, Millennium Digital Media Systems, LLC ("Millennium") is a minority owned and operated company with 35 systems that serve approximately 130,000 cable customers in Maryland, Michigan and Washington. Millennium has launched digital services and cable modem service in all three regions.

Sjoberg's Inc.

Entering the cable business in 1962, the Sjoberg family today operates 4 systems that serve approximately 8,500 customers in rural Minnesota. Sjoberg's offers analog and digital cable services, including HDTV service. Approximately 85 percent of its residential customers currently have access to cable modem service, with the rest expected to come online by the end of 2004.

Susquehanna Communications

Susquehanna Communications ("Susquehanna") entered the cable business in 1965 in York, Pennsylvania. The company currently has 9 systems serving approximately 236,000 customers in Illinois, Indiana, Maine, Mississippi, New York and Pennsylvania. Its systems offer customers both analog and digital cable services and cable modem service. Many of its systems have launched HDTV, and one system currently offers telephony service. Susquehanna is a subsidiary of Susquehanna Media. Co., a diversified radio broadcaster and cable operator.

EXHIBIT B

March 8, 2004

The Honorable George Allen
Committee on Commerce, Science and Transportation
United States Senate
254 Russell Senate Office Building
Washington, DC 20510

Dear Senator Allen:

We are writing to express our concern about government regulation of the packaging and pricing of cable program services on an a la carte or specialized tiering basis. As independent program networks, we negotiate with cable operators for carriage of our networks based on the value of our programming to consumers. We do not, for example, have the ability to use retransmission consent to gain carriage or to improve the price, terms or conditions of carriage for our networks. Government efforts to require that programming be marketed a la carte, or as part of specialized tiers, would be highly adverse to our businesses and to consumers.

Cable program services like ours generally depend on a dual revenue stream of advertising and license fees paid by cable operators and satellite carriers. A substantial portion of our networks' revenues comes from advertising, which is directly tied to audience reach. This economic model has been tremendously successful in improving the quality and quantity of television programming choices for the American consumer. Mandating a la carte or specialized tier distribution of cable networks would undermine the dual revenue stream model. Notably, it would substantially reduce audience reach and viewership, resulting in significant reductions in advertising revenue that would cause the demise of many existing cable program services and severely limit the creation of new ones. The General Accounting Office's October 2003 report confirmed that some cable networks, especially small and independent networks, would not survive in an a la carte environment.

Government-mandated a la carte or specialized tier distribution would also harm consumers. In particular, consumers would actually have *fewer* programming choices and yet, because it is highly likely that the license fees of cable program services would dramatically rise in order to cover the ad revenue shortfalls, as GAO found, prices for cable subscribers could actually *increase* under a government-mandated a la carte model.

Over the past twenty years, an impressive and vibrant cable programming industry has developed, providing Americans with the most diverse array of TV programming anywhere in the world. By contrast, government-mandated packaging in the form of a la carte or specialized tiers would significantly harm our businesses, reduce program diversity and consumer choice, and likely increase consumer cable prices. We therefore respectfully urge you to oppose proposals for such government regulation.

Thank you for your consideration.

Sincerely,

Decker Anstom
President & Chief Operating Officer
Landmark Communications, Inc.
(for The Weather Channel and
Weatherscan Local)

Rich Cronin
President & Chief Executive Officer
The Game Show Network

Andy Dale
President & Chief Executive Officer
The Outdoor Channel

Nickolas Davatzes
President & Chief Executive Officer
A&E Television Networks
(for A&E, The History Channel,
The Biography Channel, History
Channel International)

Paul FitzPatrick
Executive Vice President & COO
Crown Media Holdings, Inc.
(for Hallmark Channel)

Joe Gillespie
Chief Operating Officer
TechTV

Geraldine Laybourne
Chairman & Chief Executive Officer
Oxygen Media, Inc.

David Meister
Chairman & Chief Executive Officer
Steve Bellamy
President & Founder
The Tennis Channel

Travis Mitchell
Executive Vice President
MBC Network

Harold Morse
President & Chief Executive Officer
Ovation, Inc.

Mike Nagle
Vice President, Distribution & Advanced Products
Bloomberg Television

Kent Rice
President & Chief Operating Officer
International Channel Networks

Jeff Valdez
Co-Chairman
SíTV

EXHIBIT C

May 5, 2004

An Open Letter to Congress
From Concerned Women Programming Executives
Opposing *A La Carte* Pricing of Consumers' Television Channel Choices

Dear Members of Congress:

We urge you to oppose legislative proposals to require cable and satellite providers to offer programming on an *a la carte* basis or dictate the terms of private contracts between program networks and multichannel video distributors, including terms regarding the packaging and marketing of programming. As women television executives, who have strived to create quality programming, we take pride in the fact that our networks have vastly expanded programming choice and diversity for American consumers. Government efforts to dictate how our programming is packaged or marketed would be bad for consumers because it would give them less choice and less diversity in programming, and it would increase the price they would pay for this inferior set of offerings.

To be clear, consumers would actually have *fewer* programming choices and yet, because the license fees of cable program services would dramatically rise in order to cover the ad revenue shortfalls, as the General Accounting Office found in its October 2003 report, prices for cable subscribers could actually *increase* under an *a la carte* model. Under an *a la carte* system, consumers who now pay $40 per month for expanded basic cable service that provides 60 to 70 channels, may need to pay the same $40 for a fraction of the channels they currently receive.

In addition to harming consumers, these proposals would hurt our businesses, which our viewers value and believe have enriched the television landscape. Cable program services like ours generally depend on a dual revenue stream of advertising and license fees paid by cable operators and satellite carriers. A substantial portion of our networks' revenues comes from advertising, which is directly tied to audience reach. This economic model has been tremendously successful in improving the quality and quantity of television programming choices for the American consumer. *A la carte* distribution of cable networks would undermine the dual revenue stream model. Notably, it would substantially reduce audience reach and viewership, resulting in significant reductions in advertising revenue that would cause the demise of many existing cable program services and severely limit the creation of new ones. The GAO's report confirmed that some cable networks would not survive in an *a la carte* environment.

Over the past twenty-five years, an impressive and vibrant cable programming industry has developed, providing Americans with the most diverse array of television programming anywhere in the world. By contrast, *a la carte* – whether in place of, or as an add-on to, the current tiering model – would dramatically change the way programming is distributed and marketed and undermine the economic underpinnings of our businesses.

The cable industry is very mindful of concerns that have been raised about programming that may not be suitable for general family viewing. However, a fundamental restructuring of the programming business through *a la carte* pricing is not the solution. The cable industry is already addressing these concerns by providing its customers with tools to control the programming that comes into their homes. Specifically, cable operators are making available to customers, free of charge, technology that allows them to block any channels they wish. And cable networks have reaffirmed their commitment to labeling programs using the TV ratings system. Additionally, the cable industry has launched a comprehensive consumer education campaign to ensure parents know these tools are available and how to use them.

We urge you to oppose any efforts to require that program networks be sold or offered on an *a la carte* basis. American television viewers have shown they appreciate the incredible array of programming choices available to them today – they do not want to lose their favorite channels.

Sincerely,

Carole Black
President & Chief Executive Officer
Lifetime Entertainment Services

Kathy Dore
President of Entertainment Services
Rainbow Media Holdings, Inc.

Judy Girard
President
Shop At Home

Andrea Greenberg
President, Distribution & Rainbow Sports Network

Bonnie Hammer
President
Sci Fi Channel

Mindy Herman
President & Chief Executive Officer
E! Entertainment Networks

Brooke Johnson
President
Food Network

Geraldine Laybourne
Chairman & Chief Executive Officer
Oxygen Media, Inc.

Debra Lee
President & COO
BET Ho ldings, Inc

Judith McHale
President & Chief Operating Officer
Discovery Communications, Inc.

Laureen Ong
President
National Geographic Channel

Abbe Raven
Executive Vice President & General Manager
A&E Network

Anne Sweeney
Co-Chairman, Disney Media Netwo rks
President, Disney-ABC Television

Lauren Zalaznick
President, TRIO
Executive Vice President Network Enterprises,
Universal Television

Judith McGrath
President
MTV Networks Group

Christina Norman
President
VH1

Susan Packard
President
Scripps Networks Affiliate Sales and International
Development

Cynthia Sheets
President & Chief Executive Officer
Wisdom Media Group

Pamela Thomas -Graham
President & Chief Executive Officer
CNBC

Cyrna Zarghami
President
Nickelodeon Television

EXHIBIT D

May 12, 2004

The Honorable Joe Barton
Chairman
Energy and Commerce Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Dingell
Ranking Member
Energy and Commerce Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman and Mr. Dingell:

We understand that some Members of Congress have suggested requiring cable and satellite companies to sell basic cable networks on a channel-by-channel, or "a la carte," basis. On the surface, this idea sounds appealing, but a deeper look can only lead to the conclusion that a la carte packaging and pricing of programming would have a chilling effect on programming diversity in America.

Ethnic and minority populations in the U.S. are acutely underserved by television's current offerings, and many opinion leaders have called on media businesses to generate more channels to serve audiences of African-Americans, Hispanics, Asians, and other ethnic groups. While some progress is being made in this area, the imposition of an a la carte pricing model could bring those efforts to a screeching halt. Networks like ours, that serve diverse, minority and multilingual interests, would never have been launched in an a la carte world.

To reach the audience to which this programming is directed, cable channels need to be part of widely distributed cable or satellite tiers. Securing this kind of carriage — with the potential advertising base it provides — allows a network to sell national advertising. This ad revenue, along with the reasonable fees our channels must charge cable companies for carriage, allows us to provide high-quality programming.

If cable and satellite companies sell channels a la carte, it would instantly erode potential advertising support, forcing us to dramatically increase the per-subscriber fee we must charge. Ultimately, subscribers would find themselves paying about the same amount — and possibly more — for just a handful of channels, rather than having hundreds from which to choose, as they do today.

We are not the only ones who have recognized this outcome. In its comprehensive report on cable pricing released last fall, the General Accounting Office concluded: "If cable subscribers were allowed to choose networks on an a la carte basis, the economics of the cable industry could be altered, and if this were to occur, it is possible that cable rates could actually increase for some customers."

One of the great promises of cable is that with its multi-channel universe, subscribers can not only have programming designed for them, but also have the ability to share other cultures, communities, styles and viewpoints. The imposition of a la carte would drastically reduce, if not eliminate entirely, that opportunity.

A la carte is a classic case of a solution far worse than the perceived problem. Those who promote more diversity in today's media marketplace would do it a fatal disservice by supporting or voting for a la carte requirements.

Sincerely,

Debra Lee
President & Chief Operating Officer
BET Holdings, Inc.

Jeff Valdez
Chief Executive Officer
Sí TV

Johnathan Rodgers
Chief Executive Officer
TV One

Kent Rice
President & Chief Executive Officer
International Channel

cc: Members of the House Energy and Commerce Committee